HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII Rule 32 (2) (b)
Description of the Case.

Criminal Appeal No. 1587 of 2001
(Old No. 2374/1984)

Date of Decision : 29th March, 2006

A.F.R. (Approved for reporting)

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~~Not approved for reporting.~~

Date 29.03.2006

Initial of Judge.

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Criminal Appeal No. 1587 of 2001
(Old No. 2374/1984)

Balbir Singh
S/o Sri Shankar Singh
R/o Faizullaganj
Police Station – Thakurdwar
District- Moradabad ….Appellant

Versus

State of Uttaranchal … Respondent

Sri M.S. Pal-Sr. Advocate for the appellant
Sri A Rab, learned Addl. G.A., Sri Chaudhar Sudhir Kumar & Sri Rajeev Mohan, learned A.G.A. for the State.

Hon'ble J.C.S. Rawat, J.

The present appeal has been directed against the judgment and order dated 28.08.1984 passed by Sri. V.S. Bajpai, the then Additional Sessions Judge (Special Judge), Nainital in Sessions Trial No. 12 of 1983 convicting the appellant u/s 376 I.P.C. and sentencing him to undergo 6 years R.I. Feeling aggrieved by the said judgment and order, the present appeal has been preferred.

Brief facts for the disposal of this appeal are that Smt.Oma Devi –sister of the accused and Smt. Mungia-Mosi of the accused used to visit to the house of the prosecutrix. It is alleged in the F.I.R. that on 04.11.1981 at about 7:00 am., Smt Mungia met prosecutrix and told the prosecutrix that her son is very ill and sought assistance to accompany her to the bus station. At the first instance, the prosecutrix refused to accompany her. Later on Oma Devi insisted and requested her to accompany her to the bus station. Thereupon, the prosecutrix was persuaded by Oma Devi and Mungia at the bus station to accompany them to Faizullaganj and that she would come back within 1-1/2 hrs. from there. After great insistence from the part of both the ladies, the prosecutrix was persuaded to go to Faizullaganj. When they reached Fiazullaganj, both of the ladies handed over the prosecutrix to the Appellant-Balbir Singh and asked

her to marry with him. Smt. Mungia locked her in the room and the appellant-Balbir Singh threatened there to the prosecutrix to kill and asked her to keep silence. It is also alleged that she was taken to his sister's house in village Madhavawala where she stayed for sometime. It is also alleged that she was taken to Kanth and thereafter village Huzre and ultimately she was taken to Moradabad and she was subjected to rape on all the places. It is also alleged that naked photographs of the prosecutrix were taken by the Oma Devi to blackmail the prosecutrix. The appellant tried to perform the court marriage with the prosecutrix unsuccessfully at Moradabad and thereafter he brought her back to Kashipur on 29.11.1981. The police arrested the accused-appellant and recovered prosecutrix and sent her to Female Hospital, Kashipur, Nainital for medical examination. Medical was conducted there and thereafter the investigation was conducted and it culminated into the chargesheet.

The accused-appellant appeared before the court below and he was charged u/s 363, 366 and 376 I.P.C. The accused denied the charges and claimed the trial.

The prosecution in support of its case against the accused-appellant examined the prosecutrix-PW1 and the complainant-Ram Kishore PW2. Ram Kishore-PW2 has lodged the written report Ex. 2 at the police station on 28.11.1981. The prosecution also examined the Investigating Officer-Tejbir Singh Chauhad as PW3. Dr. J. Narula-PW4 is the Medical Officer who conducted the medical examination of the prosecutrix. The solitary evidence of prosecutrix is on record to substantive the above allegation made in the F.I.R. PW1-Prosecutrix had narrated the entire evidence as has been indicated in preceding para 2 of my judgment.

In the statement recorded u/s 313 Cr.P.C., the appellant denied the prosecution case and stated that he had been falsely implicated in this case.

The learned trial court after appraisal of the evidence on record found the appellant guilty u/s 376 I.P.C. and convicted and sentenced him as mentioned above.

I have heard learned counsel for the parties and perused the record.

It is well settled principle of law that the prosecutrix complained of having been a victim of offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the later case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for corroboration, direct or circumstantial which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman, i.e., her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. If a rape is committed upon a lady, the society as a whole does not accept the lady in the society. Sometimes it is seen that harmless lady becomes victim of rape without being her fault and she is humiliated in the society. Thus no girl ever dare to give false statement before the court that rape has

been committed upon her. The law as stands today is settled that if the statement of the prosecutrix is reliable and cogent the conviction can be based without being corroborated by other evidence. Even if the chastity has been molested at the outset, she will not come before the society stating that her modesty has been outraged because she knew that the society will not accept her without being her fault. In the circumstances, the evidence in the rape cases has to be scrutinized. The courts are therefore expected to deal with the sexual crimes against the woman with utmost sensitivity. In light of the above observation, I would like to discuss the evidence of the prosecutrix.

The prosecutrix in her evidence stated that she does not know appellant-Balbir but she knows Smt. Oma Devi-sister of the accused and Smt. Mungia-Mosi. Smt Mungia met her and told her that her son is very ill and sought assistance to accompany her to the bus station. The prosecutrix refused to accompany her. Later on Oma Devi insisted and requested her to accompany her to the bus station. The prosecutrix had stated that she was persuaded by Oma Devi and Mungia at the bus station to accompany them to Faizullaganj and she was assured that she would come back within 1-1/2 hrs. from there. After great insistence from the part of both the ladies, she was persuaded to go to Faizullaganj. When she reached Fiazullaganj, both of the ladies handed over her to the Appellant-Balbir Singh and asked her to marry with him. Smt. Mungia locked the prosecutrix in the room and the appellant-Balbir Singh threatened there to the prosecutrix to kill and asked her to keep silence. The prosecutrix was taken to his sister house in village Madhavawala where she stayed for sometime. It is also stated that she was taken to Kanth and thereafter village Huzre and ultimately she was taken to Moradabad and she was subjected to rape on all the places where the prosecutrix stayed with the appellant. She had also stated that the appellant had taken her naked photographs to blackmail her. The

appellant tried to perform the court marriage with her but she had stated to the Advocate that she is being taken to the court forcibly and the Advocate had told that the girl is minor, therefore, marriage could not take place. She had also stated in her statement that she was sexually assaulted by the appellant as well as by 3-4 other persons.

The prosecutrix-PW1 was subjected to intensive cross examination. However, no material could be brought out to discredit the creditworthiness of the examination in chief. Examining the testimony alone in the facts and circumstances of this case, I am of the clear view that the testimony of the prosecutrix inspires confidence on the basis of alone conviction can safely be sustained. It is also well establish principle of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

The learned counsel for the defence contended that the evidence of prosecutrix is not reliable because the case has been concocted against the appellant and he had falsely been implicated in this case. If she was taken on 04.11.1981 by Smt. Oma Devi and Mungia, the matter should have been reported to the police immediately by the guardian. It was contended that there is delay of about 24 days in lodging the F.I.R. and the delay has not been properly explained. Learned Addl. G.A. contended that this was an offence of rape or enticing away of minor girl from his house and nobody would like to report the matter immediately to the police. At the first instance, the father would search the girl in the house of the relatives and thereafter they would go to the police station to lodge the report. Perusal of the record reveals that Ram Kishore-PW2 had stated in his evidence during the cross examination that at the first instance, he had a mere suspicion upon the appellant so he did not reported the matter immediately and second reason he had stated

that he did not report the matter to the police to save her daughter from the society otherwise her daughter would have been defamed without any basis. So report was not lodged and proper explanation has been given during the cross examination. The Apex Court in a decision reported in **2005 SCC (Cri) p/327, State of H.P. Vs. Shree Kant Shekari** at para 17 and 18 held as under :

> *17. The High Court has also disbelieved the prosecution version for the so called delay in lodging the F.I.R. The prosecution has not only explained the reasons but also led cogent evidence to substantiate the stand as to why there was delay. The trial court in fact analysed the position in great detail and had come to a right conclusion that the reasons for the delay in lodging the FIR have been clearly explained.*
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> *18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information*

report does not in any way render the prosecution version brittle.

In the case of rape, the father of the victim at the first instance try to ascertain the real facts and thereafter they lodge the report. The girl was recovered on 29.11.1981 and she narrated the entire story then the report was lodged. Thus the explanation submitted by the prosecution is sufficient and satisfactory. I do not find any merit in the contention raised by the learned counsel for the appellant.

It was further contended by the learned counsel for the appellant that the prosecutrix-PW1 was moving here and there and she did not make any attempt to disclose or make the hue and cry so that the attention of the public could be gathered. Learned Addl. G.A. refuted the contention and contended that the prosecutrix had stated in her evidence that the naked photographs to black mail the prosecutrix was obtained by them and she was under the threat of the dire consequences so she was helpless to make the hue and cry. It was contended by the learned Addl.G.A. that if she would have made the unsuccessful hue and cry, she would have been the victim of the appellant. Thus, I am completely in agreement with the contention of the learned Addl. G.A. I do not find any merit in the contention of the learned counsel for the appellant. I have gone through the entire statement of the victim. Nothing could be elicited from the evidence of the prosecutrix. The evidence of the prosecutrix is reliable and believable.

It was contended on behalf of the learned counsel for the appellant that the age of the victim was about 17 years at the time of the incident. It was further contended that the medical report reveals that the age of the girl was more than 15 years and less than 17 years. It was contended that the girl was major. Learned Addl. G.A. refuted contention. The prosecutrix-PW1 herself had stated in her statement that she was 13 years of age at the time of incident and she was studying in class 6th in Govt. Girl College, Kashipur. Ram

Kishore-PW2 had also stated that the age of the prosecutrix was 13 years at the time of the incident. The cross examination was made at length and nothing could be elicited that her age was above 13 years. The oral testimony of the witnesses with regard to the age of the victim is credible and cogent. The said oral testimony is corroborated by the medical testimony. Dr. J. Narula-PW4 had stated in his evidence that the age of the girl was in between 15 to 17 years. The learned Sessions Judge had discussed this aspect in his judgment. I am completely in agreement with the findings recorded by the learned Sessions Judge. It was contended that there was no injury on the private part of the victim and this shows that she was a consenting party. The learned Addl. G.A. refuted the contention. It is in the evidence when she was taken to Faizullaganj, she was handed over by Oma Devi and Smt. Mungia to appellant and said that they would get her married with the appellant. Smt. Mungia locked her in the room and the appellant asked her to submit her for sexual intercourse otherwise he will kill her with pistol. She was also asked to keep silence. It is also in the evidence that she was taken from one place to another by the appellant and she was subjected to rape in all the places by the appellant. Oma Devi had also taken naked photographs of the victim and the appellant was like to use to blackmail the victim on this ground. Thus the victim was subjected to rape under threat. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation of deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. The

victim whose mental faculties are under threat and coercion, cannot be said in law, to have suffered sexual intercourse with consent. Thus the submission of the victim to the desire of appellant under threat and duress could not be considered that the victim was a consenting party. Moreover, there is one more aspect of this matter was that the victim was below 16 years of age at the time of the incident and her consent was immaterial. The incident took place on 04.11.1981 and the first rape was committed on the same date. Thereafter she was taken to different places where the appellant committed rape upon her and she was recovered on 29.11.1981. Doctor J. Narula examined the victim and gave her report Ex. Ka.8. According to the doctor no fresh injury was seen in the genital organ and no definite opinion regarding rape could be given. As per the opinion of doctor, the girl was accustomed to sexual intercourse. Even if assuming, the victim was previously accustomed to sexual intercourse that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

It cannot be held that in absence of the injuries on the person of the prosecutrix that the victim was a consenting party to the sexual intercourse. It is also noticeable that the incident took place on 04.11.1981 and medical was conducted on 29.11.1981. When the girl was recovered during that period, she was subjected to the sexual intercourse. It is natural, if she as subjected to intercourse,

for such an act the opinion of the doctor that she was habitual to intercourse was also possible. The victim was in her teens. The perpetrator of the crime was an able-bodied youth bustling with energy and determined to fulfill his lust. Having succeeded forcibly committed offence, there was none around to help the victim in her defence. The incident took place on 04.11.1981 and the injuries which the victim would have suffered or might have suffered in defending herself and offering resistance to the accused would have abrasions or bruises which would heal up in the ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the victim is not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. The absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. If the evidence of the prosecutrix is credible and cogent and the prosecution succeeded in making out convincing case for recording the findings as to the appellant being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to the technicalities or by assuming doubts and giving benefit thereof where not reasonably exists. The evidence of the victim is consistent and credible. I do not found any reason to disbelieve the evidence of the victim.

The accused has taken the case of denial and he had not stated in his statement that there was any enmity with the complainant in this case. As I have indicated above, no lady will tell against her self honour and dignity. If the appellant would have been implicated by the prosecutrix and her father, they would made other allegations but not of rape. No father will come forward to say that rape has been committed upon her daughter. Thus there is no enmity in between the parties and no such suggestions have been put to the

witnesses. Thus the testimony of the witnesses cannot be assailed on the ground of the enmity.

It was further contended that the girl was the consenting party and she went to the house of the appellant with her own accord to have marriage with the appellant. The girl was minor and even if she was consenting party, there is no consent below the age of 16 years in the case of rape.

In view of the foregoing discussions, the appeal is dismissed. Accordingly, the judgment and order dated 28.08.1984 passed by learned Additional Sessions Judge (Special Judge), Nainital in Sessions Trial No. 12 of 1983 is hereby confirmed.

Let the record alongwith a copy of this judgment be sent back to the trial court immediately for necessary action and compliance and the compliance report to be submitted within four months.

(J.C.S. RAWAT, J.)

29th March, 2006
Shiv